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No. 1136

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AERO MAYFLOWER TRANSIT CO., INC., *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

Appellant, Aero Mayflower Transit Co., Inc., appeals from a judgment of the United States District Court for the Southern District of Indiana upholding an order of the Interstate Commerce Commission which denied appellant's application for grandfather authority under Section 206(a)(5) of the Interstate Com-

merce Act, 49 U.S.C. § 306(a)(5), to operate as a motor common carrier of household goods between points within Alaska.

OPINIONS BELOW

The opinion of the examiners (R. 9) is entitled *Mollerup Van Lines, Alaska Grandfather Application* and is reported at 95 M.C.C. 338 (1964). It is printed at page 1a, *infra*. Division One of the Interstate Commerce Commission, in overruling appellant's exceptions to the examiners' report (R. 26), and the full Commission, in denying appellant's petition requesting a finding of an issue of general transportation importance (R. 29), rendered no opinions. The opinion of the District Court (R. 176) is not yet officially reported but is printed at page 12a, *infra*. The judgment of that Court (R. 183) is printed at page 17a, *infra*.

JURISDICTION

This action was commenced by a complaint filed in a three-judge district court, praying that an order of the Interstate Commerce Commission denying appellant grandfather authority to transport household goods by motor carrier within Alaska be set aside. On June 15, 1966, the District Court entered its judgment denying the relief sought. On November 10, 1966, that Court denied appellant's timely alternative motion to (a) alter or amend the judgment or (b) grant a new trial. (R. 217). Appellant's notice of appeal was filed on January 9, 1967. (R. 219).

The jurisdiction of this Court to review by direct appeal the judgment of the District Court is conferred by Section 1253 of the Judicial Code, 28 U.S.C. § 1253,

and is sustained by the decision of this Court in *St. Louis & O'Fallon Ry.* v. *United States,* 279 U.S. 461.

STATUTES INVOLVED

Section 206(a)(5) of the Interstate Commerce Act, 49 U.S.C. 306(a)(5), provides:

> "Subject to the provisions of Section 310 of this title, if any person (or his predecessor in interest) was in operation on August 26, 1958, over any route or routes, or in any area or areas, as a common carrier engaged in the transportation in interstate or foreign commerce of passengers or property by motor vehicle between places in the Territory of Alaska, and has so operated in Alaska since that time (or if engaged in furnishing seasonal service only, was engaged in such operation in the year 1958 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person or his predecessor in interest had no control, a certificate shall be issued authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceeding, if application for such certificate is made as provided herein on or before December 31, 1960: *Provided, however,* That common carriers of passengers by motor vehicle shall as a condition precedent to the establishment of rights hereunder show compliance with the applicable acts of the Territory of Alaska, and the rules and regulations of the Alaska Bus Commission. Pending the determination of any such application the continuance of such operation without a certificate shall be lawful. Applications for certificates under this paragraph shall be made to the Commission in writing, and in such form, contain such information, and be accompanied by

proof of service upon such interested parties as the Commission shall require."

Title 5 U.S.C. § 706(2)(E) (formerly Section 10(e) of the Administrative Procedure Act) provides:

"*Scope of review*

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

* * *

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in denying appellant's application for grandfather authority to operate within Alaska as a motor common carrier of household goods on the ground that appellant did not dominate, direct and control the operations of its agent in Alaska, applied an incorrect legal standard?

2. Whether the findings upon which the Commission disposed of appellant's application for grandfather authority to operate within Alaska as a motor common carrier of household goods were supported by substantial evidence?

STATEMENT

Origin and Nature of the Proceedings Before the Interstate Commerce Commission Examiners

Appellant is an Indiana corporation engaged in the business of transporting household goods. It seeks authority under Section 206(a)(5) of the Interstate Commerce Act to transport household goods in interstate commerce between points and places within Alaska.

Appellant currently has authority, under a certificate first issued on October 31, 1940, and reissued on April 23, 1954, to operate between all points and places within the contiguous forty-eight states. This authority permits it, among other things, to transport household goods by motor carrier between any point in the contiguous forty-eight states and the Port of Seattle. Pursuant to regulations of the Federal Maritime Commission, appellant is entitled to ship such goods as a "non-vessel operating water carrier" between the Port of Seattle and Alaska dockside. However, its present authority to transport these shipments between Alaska dockside and their points of origin or destination within Alaska is only temporary.

On January 3, 1959, Alaska formally entered the Union under the terms of the Alaska Statehood Act. That Act did not attempt to deal with all the transportation problems generated by the change in Alaska's status; therefore, in 1960, "grandfather" provisions permitting the Interstate Commerce Commission to license those motor carriers then operating in Alaska to continue their prior operations were added to the Interstate Commerce Act. (Public Law 86-615, 74 Stat. 382; now Sections 206(a)(4) and 206(a)(5) of the Interstate Commerce Act).

On July 31, 1957, appellant had entered into an exclusive agency agreement with a company called Alaska Van & Storage (T. 55),[1] and had begun making shipments of household goods by water to and from points and places within Alaska (T. 54-55). After passage of the Alaska grandfather provisions appellant applied, on December 28, 1960, to the Interstate Commerce Commission for authority to continue operating within Alaska, under and pursuant to the provisions of Section 206(a)(5) of the Interstate Commerce Act.[2] Appellant's application was subsequently consolidated with some eighteen similar applications of other carriers and set for hearing.

Testimony Before the Examiners

At the hearing testimony offered on behalf of appellant established the following facts regarding its operations in Alaska:

Aside from some sixty over-the-road shipments made between 1958 and 1960 on an experimental basis (T. 768-69), appellant's Alaska operations all involved

[1] All references to "T" herein refer to the transcript of proceedings before the ICC examiners, as originally paginated.

[2] Appellant also requested authority pursuant to Section 206(a)(4) of the Act. This Court has since ruled that land-sea-land operations between the contiguous forty-eight states and Alaska, of the kind relied on by appellant in support of its Section 206(a)(4) application, are not entitled to consideration in connection with a grandfather application under that section of the statute. Andrews Van Lines v. United States, 240 F. Supp. 763 (D. Neb. 1965), *aff'd per curiam*, 382 U.S. 67. Accordingly, appellant does not here challenge the ruling of the Commission and of the District Court that it was not entitled to a grandfather certificate under Section 206(a)(4). Because appellant already has authority to operate between all points in the continguous forty-eight states and Alaska dockside, a certificate issued pursuant to Section 206(a)(5) will permit it to operate in the same way as would a Section 206(a)(4) certificate.

shipments by water between Alaska dockside and Seattle and land transportation prior and subsequent to the water movement. (T. 54-55). Appellant at all times held itself out to serve all points in Alaska (T. 55), and filed with the various military installations in Alaska "military tenders" in its own name. Although all shipments made pursuant to these tenders were made in the usual way *(i.e.,* by means of an agent in Alaska), the agent's name never appeared in any of the tenders, and appellant had on file in Alaska no joint tenders. (T. 750). All of appellant's Alaska traffic moved on a Mayflower bill of lading from its origin to its destination (T. 55, 68), so that in all cases the delivering carrier was shown on the bill of lading to be Aero Mayflower Transit Co. (T. 750). All shipments included in the exhibits of appellant were the shipments "of the Aero Mayflower Transit Company from origin to destination regardless of which direction [they] move[d]." (T. 772).

That portion of the transportation which occurred within the contiguous forty-eight states was always performed by appellant itself or by an authorized agent of appellant, in the usual manner. (T. 698). The portion of the transportation between Seattle and Seward, Alaska, was usually performed over the Alaska Steamship Line. *(Ibid.)* The bills of the steamship carrier were submitted to appellant's agent, Alaska Van & Storage, and the whole amount thereof was ultimately paid by appellant. (T. 740). Likewise, appellant assumed all liability for the goods while on the water, through its various insurance policies. *(Ibid.)*

In operating as appellant's agent in Alaska, Alaska Van & Storage picked up and delivered all of appellant's shipments originating in or destined for Alaska,

and performed the usual services of an agent in that area. (T. 54, 795, 805). Under the agency contract, Alaska Van & Storage was not free to act as an agent for any other carrier at the same time it was acting as an agent for appellant (T. 734), and in fact Alaska Van & Storage did not represent anyone except appellant in Alaska (T. 763). It was the "exclusive agent" of appellant in Alaska. *(Ibid.)* Its stationery bore a printed legend saying "Alaska Agent for Aero Mayflower Transit Company." (T. 777). It advertised in the telephone directories of both Anchorage and Fairbanks as an agent for appellant. (T. 779). At one time it even sponsored bowling teams in Anchorage under the name of appellant. (T. 780).

For the purpose of performing services as agent for appellant, Alaska Van & Storage set aside a specific portion of its equipment under written lease for the use of appellant. (T. 726-27). These trucks could not be used for any other operations of the agent. (T. 704-05). They were marked with the Aero Mayflower insignia (T. 764-65) and inspected as to their suitability for appellant's purposes (T. 704). Vehicles and drivers were expressly subject to the approval of appellant. (T. 751-52, 771). A drivers' manual was distributed to the drivers, setting forth the procedures prescribed by appellant for the operation of the equipment and the loading, weighing, and unloading of payloads. (T. 757). Under the agency agreement all Alaska Van & Storage shipments moving more than 150 miles were required to be cleared with the Los Angeles dispatcher of appellant (T. 747), and according to the abstracts on file at appellant's central office this was done (T. 753). The result was that the equipment used in the Alaska operation was "under the

exclusive control and direction of Aero Mayflower at all times". (T. 55).

Alaska Van & Storage had authority on its own to settle claims against appellant when they amounted to $75 or less, but those over $75 had to be initially approved by the Indianapolis office. All claims, whatever the amount, were ultimately processed through the Indianapolis office and paid by appellant. (T. 776). Alaska Van & Storage was compensated for its services to appellant by monthly settlements on a commission basis. (T. 778-79). In addition, all of its facilities were inspected for suitability by a representative of appellant. (T. 755).

The Findings of the Examiners and Decision of the Commission

On July 10, 1963, the co-examiners filed a single report setting forth their findings and recommendations with regard to all nineteen applicants for Alaska grandfather authority, and entitled *Mollerup Van Lines, Alaska Grandfather Application.* (P. 1a, *infra*).

The examiners found that none of the applicants was entitled to authority under Section 206(a)(5), on the ground that "none of the several applicants has ever actually conducted any motor operations in Alaska." (P. 8a, *infra*). They noted that each applicant based its claim to a certificate on the operations of an Alaska-based agent, and made a general finding that:

> "All matters pertaining to the operation of the vehicles, and the direction and control of such operations were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier." (P. 10a, *infra*).

The examiners cited several general characteristics which they asserted to be true of most or all of the applicants. They found that the Alaska agents were all motor carriers in their own right, and that they utilized their own vehicles, facilities, and personnel. (P. 8a, *infra*). They found that most of the agents had filed grandfather applications in their own names and that their claims in this regard were based "to a considerable extent" upon the shipments which appellant and the other applicants cited as a basis for their own grandfather authority. *(Ibid.)* They found that "the latter" [*i.e.*, "the so-called agents"] had entered appearances in the proceedings "in opposition to the granting of the instant applications." (Pp. 8a-9a, *infra*).

Asserting that the "primary factor" in determining whether applicants were entitled to grandfather certificates was whether they had "dominated, directed, and controlled the movement" of the shipments upon which their applications were based, the examiners found that all of the equipment used was owned by the Alaska-based carriers and that "none of this equipment was ever actually leased to any of the stateside applicants." The examiners noted that "one or two" of the applicants did submit copies of purported lease agreements, but nonetheless found that: "There is no convincing evidence that any equipment was actually leased under terms of such agreements." (P. 9a, *infra*).

The examiners did find that the shipments in question moved on bills of lading of the applicant carriers and that the shipments evidenced by those bills were moved on through rates published by those carriers. (P. 10a, *infra*). Nevertheless, the examiners con-

cluded that none of the applicants was ever "engaged in operation as a common carrier by motor vehicle between points in Alaska," and that all of the applications should therefore be denied on this point. *(Ibid.)*

Exceptions to the report and recommended order of the examiners were filed by appellant on August 23, 1963. The decision and order of Division One of the Interstate Commerce Commission, overruling appellant's exceptions, was filed on January 13, 1964. That decision affirmed the findings of the examiners and adopted the examiners' opinion as its own. Thereafter, appellant filed with the Interstate Commerce Commission a petition requesting a finding of an issue of general transportation importance. On February 26, 1964, the Interstate Commerce Commission entered its order denying appellant's petition.

The Proceedings in the Court Below

Having thus exhausted its administrative remedies before the Interstate Commerce Commission, appellant filed a complaint before a three-judge district court, seeking to have the order of the Interstate Commerce Commission set aside. (R. 4). The court denied the relief requested. In regard to the appellants' application for authority to operate within Alaska under Section 206(a)(5), the court simply held that:

> "We have carefully reviewed the whole record and find that there is substantial evidence to support the negative finding of the Commission that plaintiff (who had the burden of proof) failed to prove that it so controlled Alaska Van & Storage Company as to make its operations that [sic] of plaintiff. Such finding is therefore conclusive." (P. 14a, *infra*).

Thereafter appellant, after denial of its alternative motion to alter or amend the judgment or for a new trial, instituted this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.

The Decision Below Rests Upon An Erroneous Legal Standard

The examiners' opinion, adopted by the Commission, refused to grant appellant the authority sought under Section 206(a)(5) on the ultimate ground that the Alaska operations relied on by appellant had been conducted through a "so-called agent" and that the agent was not "dominated, directed, and controlled" by appellant. (P. 9a, *infra*). Decisions of this Court establish that this was an erroneous legal basis for refusing to grant the authority sought.

As early as 1942 it was made clear by this Court that the question of direction and control is not decisive in a grandfather application proceeding. *United States* v. *Rosenblum Truck Lines, Inc.*, 315 U.S. 50. Although the case is usually cited for its holding that only one carrier may be given operating authority on the basis of a single set of operations, the Court, in reaching that conclusion, clearly stated the standard for determining which carrier should receive the Commission's sanction. It was to be that carrier "who offered the complete transportation service to the general public and the shipper." (315 U.S. at p. 54). As became clear in later decisions, the carrier offering the complete transportation service to the public and to the shipper by no means necessarily "directs and controls" every portion of the operation.

In *Thomson* v. *United States*, 321 U.S. 19, this Court further elucidated that standard. Thomson was a trustee for the Chicago and Northwestern Railway which, for some time prior to the reported proceedings, had been operating a motor vehicle transportation service between various stations on its lines to supplement its rail-freight service. These motor operations were conducted by independent contractors who hired their own employees, used their own trucks, and assumed responsibility for any damage occurring to the freight while in their possession.

The Interstate Commerce Commission held that under these circumstances the railroad did not exercise direction and control over the operations of the truck-lines and was therefore not entitled to a grandfather certificate on the basis of the trucking operations. *Chicago & N.W. Ry., Common Carrier Application*, 31 M.C.C. 299 (1941). A three-judge district court affirmed the Commission's holding without opinion, and a direct appeal was taken.

This Court held that the Commission had erred in finding that the railroad was not entitled to certification as a common carrier by motor vehicle. It expressly noted that its decision was *not* predicated on a determination that there was insufficient evidence to support the Commission's conclusion that direction and control had been lacking. Rather it was based on a finding that the Commission had made "an incorrect application to these facts of the statutory provisions and Congressional intention relating to 'grandfather' rights of common carriers by motor vehicles." (321 U.S. at p. 23). The Court noted that the trucking service was but a part of the overall transportation service provided by the railroad and found that "only

the railroad holds itself out to the general public to engage in a single complete freight transportation service to and from all points on its lines." (*Id.* at p. 24). On this basis it held that: "The railroad alone is entitled to common carrier 'grandfather' rights as to the motor vehicle service forming an integral part of its unified freight service." (*Id.* at p. 25). The Court conceded that the truckers might be entitled to grandfather permits of their own with regard to other operations, but emphasized that only the railroad acquired such rights from the freight which was transported as an integral part of the railroad's coordinated rail-motor service.

The Court recognized that the result reached by applying this test was not necessarily consistent with a direction and control standard. It stated:

> "This so-called 'control and responsibility' test, however, is applicable in this case only insofar as it aids in determining the person offering and engaging in the single coordinated rail-motor freight service. To the extent that it leads to a result different from that reached by the application of the statutory provisions and the Congressional intent which we have indicated, it must be disapproved." (*Id.* at p. 26).

Thus this Court specifically ruled that a direction and control test was of secondary importance only, and that where it suggested a result different from the "single coordinated freight service" test, it must be disregarded.

Subsequent cases have made unmistakably clear the meaning of this holding. In *Wirtz* v. *Highway Trays., Inc.*, 310 F.2d 643, 646 (4th Cir. 1962), the Court cited *Thomson* and *Rosenblum* as "cases holding that the

carriage was solely that of the primary carrier, within the meaning of the extension of 'grandfather' rights * * *."

A 1955 court of appeals decision spells out the applicable standard even more clearly:

> "And the Supreme Court has twice specifically recognized that in determining the question of *who* is the carrier, *i.e.*, the person engaging in the *transportation*, the solution does not depend on the status of the ownership of the equipment employed or, for that matter, the physical control over the operation thereof: [Citing *Rosenblum* and *Thomson*]" *Agricultural Trans. Assn.* v. *King*, 349 F.2d 873, 880 (5th Cir. 1955).

In specific reference to the facts of the *Thomson* case, the court stated that the railroad rather than the motor carrier was entitled to the grandfather rights and that:

> "This was so even though the contract between railroad and truck owners described the operators as 'independent contractors' and the facts showed actual, complete independent physical control. Thus drivers were employees of the truck owner who paid all operating expenses including indemnification of the railroad against loss or damage claims, costs of insurance, and the like. The Court held this was transportation by the railroad, not the contractor * * *. In doing so the Court * * * here rejected the ICC's application of the common law control test to physical operations of the vehicles." (*Ibid.*)

See also *Canal Insurance Co.* v. *Dougherty*, 247 F.2d 508, 511 (5th Cir. 1957); *Evans* v. *United States*, 65 F. Supp. 183, 187 (W.D. Va. 1946).

The application of these precedents to the facts of this case is clear. It was appellant that held itself out

to the public in general and to the shippers in particular as performing a transportation service to and from Alaska, and on whose bills of lading the shipments moved. (T. 55). It was appellant that assumed complete responsibility for the shipments, underwriting all claims and paying all expenses of the transportation. (T. 776, 740). It was appellant that dealt with the shippers and whose name and emblem appeared on the vans used in the operation. (T. 764-65). And whether or not actual physical control of the operation in Alaska was maintained at all times, it is indisputably clear that the lease arrangement with Alaska Van & Storage gave appellant the legal right to control and direct all operations in Alaska, including the right to reject, for any reason it saw fit, either facilities or personnel tendered by its agent, Alaska Van & Storage. (T. 751-52, 771). Under these circumstances it was clearly appellant that performed a single coordinated transportation service for household goods between the United States and Alaska; under the test of the *Thomson* and *Rosenblum* cases it was clearly appellant that was entitled to grandfather rights on the basis of this operation.

It seems inescapable that the District Court erred in refusing to set aside the Commission's refusal to grant appellant authority to operate within Alaska under Section 206(a)(5), since the Commission's decision was clearly based on an erroneous legal theory.

II.

The Findings Upon Which the Examiners Disposed of the Applications Are Not As to This Appellant Supported by Substantial Evidence

The examiners made a number of general findings which appear intended to provide a foundation for the conclusion reached. A substantial number of these findings, though perhaps true of the majority of the applicants, are not supported by substantial evidence in their application to appellant. For this reason the District Court erred in sustaining the order as to appellant.

The examiners found that "the so-called agents" had entered appearances in the proceedings "in opposition to the granting of the instant applications." (Pp. 8a-9a, *infra*). This finding is without any factual basis as to appellant. Not only did appellant's agent, Alaska Van & Storage, *not* enter an appearance in opposition to the granting of this application, but one of its employees, with the complete knowledge and consent of the president of Alaska Van & Storage, and at his direction, testified on behalf of appellant (T. 767).

Referring to the transportation equipment owned by the Alaska-based carriers and used by those carriers based in the forty-eight contiguous States, the examiners found that "none of this equipment was ever actually leased to any of the stateside applicants." The opinion goes on to acknowledge that "one or two of the applicants" submitted copies of purported lease agreements, but concludes that, nevertheless, "there is no convincing evidence that any equipment was actually leased under the terms of such agreements." (P. 9a, *infra*).

Appellant was one of the "one or two" applicants who submitted lease agreements, and introduced testimony both specific and uncontroverted that "equipment was actually leased" under the agreement. The Secretary-Treasurer of appellant described three units of equipment which were specifically subject to the original lease, in July of 1957, and testified that the amount of leased equipment had grown to approximately thirty units, listed and described in an exhibit, at the time of the hearing. (T. 726-28). The fact that equipment had actually been leased under the terms of appellant's lease agreements was never contested during the entire proceeding.

This Court has held that the substantial evidence required to support an administrative finding "must do more than create a suspicion of the existence of the fact to be established." *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. If the basis of the finding was doubt as to the credibility of appellant's witness, a specific subsidiary finding to that effect was a "necessary finding" to support the examiners' conclusion. *Administrative Procedure Act, Legislative History,* Sen. Doc. No. 248, 79th Cong., 2d Sess., (1946), p. 210. See also *Bridges* v. *Wixon,* 144 F.2d 927, 944 (9th Cir. 1944). The examiners clearly erred in their determination so far as appellant was concerned.

The examiners found that the operations of the various Alaska agents were "not confined to the handling of traffic for any particular applicant." (P. 8a, *infra*). So far as appellant is concerned, the only relevant evidence is contrary to this finding. That evidence showed that appellant's agent, Alaska Van & Storage, was prohibited by its agency contract from acting as agent for any other carrier at the same time

it was acting as an agent for appellant. (T. 734). The evidence further showed that Alaska Van did not, in fact, represent anyone except appellant. (T. 763). There was abundant testimony that Alaska Van & Storage was the "exclusive agent" of appellant in Alaska (T. 54, 734, 751, 763), and no evidence to the contrary. The Commission's generalized contrary finding is therefore, as applied to appellant, totally unjustified by the record.

The examiners found that "all * * * dispatchers * * * were and are on the payrolls of the Alaska-based carriers and responsible directly thereto." (P. 10a, *infra*). Such a finding flies in the face of evidence clearly spread upon the record that Alaska Van's operations in Alaska were subject to the jurisdiction of Mayflower's Los Angeles dispatcher. (T. 747).

Finally, the examiners concluded that: "All matters pertaining to the operation of the vehicles, and the direction and control of such operation were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier." (P. 10a, *infra*). This sweeping conclusion, presumably based on the findings already shown to have been, so far as appellant is concerned, unsupported by substantial evidence, falls with those findings.[3]

In summary then, it is clear that a number of the examiners' basic findings, when applied specifically to

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[3] The conclusion also completely ignores the fact that, under written leases drawn in complete conformity with ICC regulations adopted for the express purpose of assuring control of the leased vehicle in the lessor, so as to bring such vehicles within the Commission's authority (American Trucking Assns. v. United States, 344 U.S. 298), both drivers and equipment of Alaska Van & Storage were expressly subject to the approval of the Aero Mayflower Transit Co. (T. 751-52, 771).

this appellant, are simply not supported by substantial evidence in the record. When these findings are disregarded, as they must be, it is apparent that even under the Commission's theory of the case the rejection of appellant's grandfather application was unjustified. See *Dixie Ohio Exp. Co., Common Carrier Application,* 17 M.C.C. 735 (1939); *Auclair* v. *United States,* 72 F. Supp. 160 (D. Mass. 1947); *Interstate Dispatch, Inc., Common Carrier Application,* 30 M.C.C. 763 (1941). The court below clearly erred in failing to set aside the Commission's decision on the ground that its essential findings lacked adequate support in the evidence.

CONCLUSION

The questions presented by this appeal are of grave importance to the future of motor common carrier transportation to, from, and within the State of Alaska. The appeal also raises important issues regarding the Commission's regulation of transportation in the aggregate. The question of what is the proper standard to apply in determining whether a secondary carrier which performs transportation under lease for another carrier is merely an agent of the primary carrier, or is a primary carrier in its own right, is apparently not adequately settled. The Supreme Court decisions in the *Thomson* and *Rosenblum* cases clearly take the position that the question of "direction and control" is secondary to the question of which carrier held itself out to perform the "single coordinated transportation service." On the other hand, the Interstate Commerce Commission has steadfastly adhered to the "direction and control" standard, ignoring the cited cases. With lease arrangements becoming ever more prevalent in the field of motor carrier transportation, it is

important to the future stability of the transportation system that the Court again consider this question and put it to rest once and for all.

Appellant respectfully suggests that the issues presented by this appeal are so substantial that they warrant plenary consideration by this Court.

Respectfully submitted,

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APPENDIX

INTERSTATE COMMERCE COMMISSION

No. MC-1931 (Sub-No. 5) et al.

Mollerup Van Lines Alaska Grandfather Application

Report and Order

Recommended by Frank R. Saltzman and James C. Cheseldine, Examiners

These 19 so-called Alaska "grandfather" applications involve related issues, and will be disposed of in a single report.

The several applications were assigned to the examiners for hearing and the recommendation of an appropriate order thereon, and they were heard, on a consolidated record, at Spokane, Wash., June 25 through June 29, 1962, at Chicago, Ill., on September 17 and 18, 1962, and at Anchorage, Alaska, on October 15, 1962. Each of the applications is opposed by one or more motor common carriers operating in the affected territory, and the Department of Commerce, State of Alaska, intervened as its interest might appear.

All of the applications seek authority under the "grandfather" provisions of section 206(a) of the Interstate Commerce Act for the continuance of operation to and from points in Alaska, and most also seek authority for operation between points in Alaska, in the transportation of household goods as defined by the Commission. One applicant, Trans-American, also seeks authority for the transportation of pianos, typewriters, and self-propelled property- or passenger-carrying vehicles, but no evidence was submitted in respect of the movement of these items to, from, or between points in Alaska on and continuously since the critical date for the determination of "grand-

father" rights. The territorial scope of the authority sought by each applicant is set forth in Appendix A, hereto. All of the several applicants are seeking operating rights between points in Alaska, on the one hand, and, on the other, points in all or a number of continental States south of the southern Canadian border, hereinafter called the "South-48". The granting of "grandfather" authority for the continuance of such "overhead" service is provided for in section 206(a)(4) of the act. In addition, all applicants except Mollerup, Andrews, Richardson, Bekins, Dean, and Express seek authority, under the provisions of section 206(a)(5) of the act, for the continuance of operations between points in Alaska. Trans-American has included in its application a request for authority to operate between Seattle, Wash., and points within the South-48, as described in Appendix A, and certain other carriers have included a request for authority to operate to and from Hawaii. Such requests are beyond the scope of the benefits bestowed by the respective "grandfather" clauses indicated above.

For ready reference, the pertinent provisions of sections 206(a)(4) and 206(a)(5) are set forth in Appendix B hereto. Grants of authority under these provisions are dependent upon the establishment by the respective applicants that they were engaged in *operation* within the scope thereof on and continuously since August 26, 1958, hereinafter sometimes called the "statutory date" or the "critical date", which is the date on which the electorate of Alaska, then a Territory, voted to accept Statehood under the terms of the Alaska Statehood Act. Alaska formally became the 49th State of the Union on January 3, 1959, and for-hire motor carriers operating therein in interstate or foreign commerce thereupon became subject to the applicable provisions of the Interstate Commerce Act. In the absence of "grandfather" legislation, the Commission found it expedient and desirable in many instances to issue temporary authorities, under section 210(a) of the act, to for-hire

motor carriers said to be operating in Alaska in interstate or foreign commerce at the time of the State's admission to the Union and which concurrently became subject to the provisions of the act in respect of such operations. Applications for such temporary authority on behalf of some of these applicants were denied.

Common carrier facilities for the movement of household goods between points in Alaska and points in the South-48 have been available to the public for several years. Insofar as concerns the participation in such movements by motor vehicle, two distinct modes of transportation are and have been utilized, (1) an all-motor overland movement by highway from point of orgin to point of ultimate destination, and (2) a combination movement utilizing, in addition to service by motor vehicle, service by water, rail, or air transportation. These combination movements, except those involving air transportation, move almost entirely through the Port of Seattle and are handled typically as follows: The goods are picked up in the South-48 by a so-called stateside carrier such as the applicants herein, are transported overland to Seattle where they are turned over to an Alaska-based carrier for consolidation and loading into so-called sea-vans, which are large containers, owned by the Alaskan-based carriers, resembling somewhat the body of a van-type motor vehicle; the loaded sea-vans are transported by the Alaskan-based carrier to the Seattle Port where they are loaded onto a steamship or barge and dispatched to Alaska in the name of the Alaskan-based carrier; the sea-van is then transported by the water carrier to an Alaskan port, there being turned over either to the Alaskan-Based carrier for direct overland delivery of the contents to the householder, or for movement to the warehouse of such carrier for break-bulk and subsequent distribution to the premises of the householder or householders whose goods are loaded therein. In the case of sea-vans moving into Alaska through the

Port of Seward, the vans are generally transferred at Seward from the water carrier to the Alaska Railroad[2] for movement to an inland point, where they are then turned over to the Alaskan-based motor carrier for direct delivery to the householders or for break-bulk and subsequent delivery to the householder or householders whose goods are loaded therein. The sea-vans are transported by motor vehicle on flat-bed equipment and generally contain two or more separate shipments in a single van. The household goods handled by these applicants are generally covered by a single bill of lading issued on the masthead of a stateside carrier and covering movement from origin to destination at a single-factor rate. In some instances, the names of the motor carriers participating in the through movements are shown on the bill, but frequently they are not so shown, and in no instance are the names of the participating rail and water carriers shown.

One thing is abundantly clear, this Commission is not here concerned with movements other than those performed by applicants as *common carriers by motor vehicle*. The Commission is without authority to grant certificates under the provisions of section 206(a) of the act except in respect of operation by motor vehicle. Transportation by water, rail, or air is not transportation by motor vehicle and cannot form the basis for a grant of authority for motor vehicle operations under the "grandfather" provisions of the act. Further, it is clear that certificates granted under section 206(a)(4) must be limited to the authorization of service to and from points in the South-48 which the applicants were *certificated* to serve prior to the date Alaska was admitted to the Union, and then only to the extent that under such certificates they were authorized to perform *"within the States"* all transportation required for through

[2] The Alaska Railroad is a Government-owned road operating between the Port of Seward and Fairbanks, through Anchorage. It also has a spur line extending to the Port of Whittier, and is the only form of land transportation to and from that point.

motor vehicle transportation by the carriers to or from places in the territory of Alaska.

Evidence in support of the applications were submitted by the various applicants, including lists of shipments professed to have been transported between points in Alaska and points in the South-48 on and continuously since the critical date. Bills of lading or other documents supporting such lists were made available to protestants and other interested parties at the hearing, but were not submitted in evidence. Generally, the lists merely show the origin and destination of a particular shipment, with no indication as to the portion of such movement which was actually handled by motor vehicle or the points between which the respective applicants actually moved the shipment. Shipments are shown as originating at points in the South-48 which applicants are not authorized to serve, with no indication as to the portion of the movement handled by the particular applicant claiming rights thereunder. In some instances, where shipments were admittedly made through the Port of Seattle, applicants were not authorized to serve Seattle and movements by motor vehicle to and from that point were either handled by applicants in violation of the terms of their certificates, or handled by some other undisclosed carrier on an interchange or "lease" basis. With few exceptions, the lists fail to disclose the Alaskan points between which motor vehicle transportation was utilized as distinguished from rail service provided by the Alaska Railroad. In some instances, the documentation supporting the lists are on the bills of carriers other than those claiming the rights. In no instance, is there any evidence of shipments moving between points in Alaska which were not moved in part by the respective applicants between points in the South-48.

In addition to the lists of shipments discussed above, a number of the applicants also submitted copies of tariffs filed with this Commission or the Federal Maritime Board,

and so-called military rate tenders filed with and approved by the Department of Defense or subordinate offices thereunder. These publications and tenders, of course, are of value in this proceeding only to the extent of showing some sort of a holding-out on the part of the carrier to perform service (not necessarily motor service) at the time indicated. In many instances, the tariffs and tenders bear effective dates subsequent to the critical "grandfather" date and are of little probative value even in appraising the nature and extent of the holding-out.

Two of the applications, those of American Red Ball and Trans-American, must be denied in their entireties, regardless of other considerations, because the respective applicants have failed to establish that they conducted any motor operations or that they participated in any movements of household goods to or from Alaska on or prior to the statutory date. The proposed holding-out of these carriers, without any actual operation commensurate therewith, cannot form a proper basis for a grant of "grandfather" authority. No further consideration will here be given to such applications.

As heretofore indicated, the Commission is here concerned only with operations conducted on and continuously since the statutory date *by motor vehicle*. The evidence lends itself to discussion under two general categories, (1) all-motor overland service between points in Alaska and points in the South-48, and (2) motor service conducted between points in Alaska incidental to through movements involving other modes of service, such as by water, rail, or air, to or from points in other States.

Overland Service Between Points in Alaska and Points in the South-48. Of the several applicants, only North American can qualify for a grant of authority in this category. It has conducted substantial overland operations between points in Alaska and points in the South-48 continuously since prior to the statutory date and is entitled

to a certificate authorizing the further continuance thereof. Prior to the date of the admission of Alaska into the Union, it was authorized under an appropriate certificate issued by this Commission to transport household goods between points in the United States, and hence was authorized to perform "within the States" all transportation required for through motor vehicle movement to or from points within the Territory of Alaska, a condition to the granting of any authority under section 206(a)(4) of the act. North American is entitled to a certificate authorizing the continuance of its overland operations to and from points in Alaska. Of the other applicants, only a few have established any significant amount of overland operations to and from Alaska, and none have established such operations on and continuously since the statutory date. In the circumstances, it will not be necessary to discuss any disability which these carriers may have had insofar as concerns operating rights "within the States" prior to the admission of Alaska into the Union.

Motor Service Between Points in Alaska. All of the applications will be considered in this category to the extent that motor operations are claimed to have been performed in Alaska on and continuously since the statutory date in connection with through service to and from points in other States and performed in part by other modes of transport. Certain of the applicants failed to include in their applications specific requests for authority to operate between points in Alaska, and one, Bekins Van Lines Co., amended its application at the hearing to eliminate a request for such authority which was included in its application as filed. In spite of protestants contentions to the contrary, this examiner is of the opinion that the initial requests by these applicants, which were timely filed, for overhead authority between points in Alaska and points in the South-48, are sufficient upon which to predicate consideration of that part of the claimed overhead operation which was performed by motor vehicle as an incident

to the through movement. This is particularly appropriate here, where the record as a whole indicates a considerable amount of misunderstanding on the part of many of the applicants as to the exact meaning of the two "grandfather" clauses here under discussion. In other words, the action here proposed to be taken amounts to nothing more than the giving of consideration to the entire overhead movement for which authority was initially requested and the rejection of such portions of the overhead authority sought which are not pertinent to the "grandfather" provisions, namely, those portions not performed by motor vehicle.

It is abundantly clear that none of the several applicants has ever actually conducted any motor operations in Alaska. Their claims to "grandfather" rights in this category are based upon the operations of certain Alaska-based motor carriers which they refer to as their agents. These so-called agents are motor carriers actually conducting common carrier operations in Alaska, utilizing their own vehicles and other facilities and employing their own personnel, including the drivers of the vehicles used and all other persons engaged in the conduct of the business. Their operations are not confined to the handling of traffic for any particular applicant. In addition to their operations as motor carriers, they forward traffic handled by them to or from points beyond Alaska by water and by air, such traffic being forwarded in their names and utilizing their sea vans or air vans which frequently contain the freight of two or more stateside carriers and freight forwarding companies. Most of the so-called agents have filed "grandfather" applications in their own names and are basing their claim to rights thereunder, to a considerable extent, upon the shipments which they have actually transported under arrangements with these stateside applicants and upon which the latter are also dependent for the establishment of their rights. In addition to the filing of "grandfather" applications by the so-called agents, the latter have entered appearances herein in opposition to the

granting of the instant applications. Thus, there immediately arises the very important question as to which carriers are entitled to rights by reason of the operations shown to have been conducted on and since the statutory date. Obviously, two carriers cannot be awarded "grandfather" motor-carrier authority arising out of the same motor-carrier operation, and it becomes necessary, in a contest such as here presented, for the Commission to make a factual determination as to which of the contestants was, on and continuously since the statutory date, *engaged* in *operation* as a *common carrier by motor vehicle* in respect of the shipments shown to have been transported.

Of primary importance in the determination of such factual situation is the matter of which carrier, the stateside applicant or the so-called Alaska-based agent, owned the vehicular equipment utilized, or regardless of ownership of such equipment, which carrier dominated, directed, and controlled the movement thereof. On this score, the record clearly indicates that all vehicular equipment utilized in the Alaska operations under consideration was owned by the Alaska-based carriers, and that none of this equipment was ever actually leased to any of the stateside applicants. Most of the applicants admit that they neither owned or leased any of the equipment used in Alaska. One or two submitted copies of leasing agreements said to have been in effect on the statutory date, but there is no convincing evidence that any equipment was actually leased under the terms of such agreements. Moreover, it is difficult to see how such agreements could have been effective as bona fide leasing arrangements because of the fact that the lessors utilized such equipment for the handling of their own traffic and also the handling of goods moving on the "paper" of two or more stateside carriers for forwarding companies at the same time. In addition to the fact that none of the several applicants are shown to have had any vehicular equipment dedicated to their exclusive use in Alaska on and since the statutory date, it is also clear

that none had any other physical properties in Alaska such as storage warehouses, break-bulk or packing facilities, terminals, or even offices available for their use in handling movements of household goods.

All matters pertaining to the operation of the vehicles, and the direction and control of such operation were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier. All drivers, dispatchers, supervisors, and others having to do with the operation of the vehicles were and are on the payrolls of the Alaska-based carriers and responsible directly thereto, and none of the applicants herein have ever had any of their own personnel assigned to duties in Alaska on other than a casual sight-seeing or exploratory basis.

About the only thing even associating these applicants with movements of household goods between points in Alaska is the fact that they executed bills of lading on their own mastheads showing through movements originating at or destined to points in Alaska, and that the shipments evidenced by such bills were moved on through rates published by them. Obviously, these facts, standing alone, are of little probative value here, particularly where the evidence otherwise definitely indicates that the carrier executing the bills did *not* perform all of the transportation evidenced thereby and where there is no showing of the extent of the motor service utilized in the through movement.

The conclusion is inescapable that one of these applicants was ever *engaged in operation as a common carrier by motor vehicle* between points in Alaska, except to the limited extent to which some are shown to have conducted overland services to or from points in the South-48, as heretofore discussed, and hence all of the applications must be denied insofar as authority is sought to operate between points in Alaska.

Findings. In consideration of all of the evidence submitted, the examiners find, in No. MC-107012 (Sub-No. 30), that North American Van Lines, Inc., is entitled to a certificate of public convenience and necessity authorizing continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle of household goods, as defined by the Commission, between points in Alaska, on the one hand, and, on the other, points in the Continental United States other than Alaska, over irregular routes by reason of its having been engaged in such operations on and continuously since August 26, 1958. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application denied in all other respects.

The examiners further find, in the other proceedings here considered, that the respective applicants have failed to establish the right to certificates of public convenience and necessity under the "grandfather" provisions of section 206(a) of the Interstate Commerce Act by reason of operations conducted on and continuously since August 26, 1958, and that the several applications should be denied.

In view of the findings herein, it is recommended that the appended order be entered.

By Frank R. Saltzman and James C. Cheseldine, Examiners.

(Signature) FRANK R. SALTZMAN
(Signature) JAMES C. CHESELDINE

[Filed June 15, 1966]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CIVIL ACTION No. IP 64-C-605

AERO MAYFLOWER TRANSIT CO., INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA *and*
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

NORTH AMERICAN VAN LINES, INC.,
ALASKA ORIENT VAN SERVICE *and*
SMYTH OVERSEAS VAN LINES, INC., *Intervening Defendants.*

Opinion

Plaintiff, an Indiana corporation having its principal office in Indianapolis, Indiana, brought this action to annul an order of the Interstate Commerce Commission (hereinafter "the Commission"). Jurisdiction and venue exist in this court pursuant to 28 U.S.C. §§ 1336 and 1398. The proceedings were had before a three-judge court pursuant to 28 U.S.C. §§ 2321-2325, incl. We deny relief.

The order attacked is entitled Mollerup Van Lines Alaska Grandfather Application, reported at 95 M.C.C. 338 (1964). In such report and order the Commission denied to plantiff and others authority to operate in interstate commerce as motor common carriers between the United States and Alaska, and within Alaska, pursuant to 49 U.S.C. § 306(a)(4) and (5). The involved sections of statute confer "grandfather" rights upon common carriers by motor vehicle which were, pursuant to Commission authorization, transporting property between places in the United States and places in Alaska, or within

Alaska, on August 28, 1958, provided such operations continued to date of application for a certificate confirming such rights.

Plaintiff's predecessor corporation was granted in 1940 a certificate of convenience and necessity to operate as a motor common carrier of household goods between all points in the United States. In 1950, the Congress amended Part II of the Interstate Commerce Act by adding the subsection codified as 49 U.S.C. § 306(a)(2), which reads as follows:

> "Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this chapter, or hereafter issued under this chapter pursuant to an application filed on or before September 1, 1950, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States."

This statute automatically broadened the certificate held by plaintiff's predecessor to include the right to operate to, from and within the then Territory of Alaska. In 1954 plaintiff's predecessor was merged into the present corporation, and a new certificate, identical in wording to that issued in 1940, was issued to plaintiff.

Prior to August 28, 1958 plaintiff entered into an arrangement with Alaska Van & Storage Company, an Alaska-based company, whereby Alaska Van was to act as plain-

tiff's agent in Alaska, and to lease it motor vehicle equipment, for the purposes contemplated by plaintiff's certificate. A substantial number of movements of household goods were made to, from, and within Alaska on and prior to such critical date by Alaska Van, using plaintiff's bills of lading, and purportedly acting as plaintiff's agent. However, the Commission found that plaintiff exercised insufficient domination, control and direction over the operations of its alleged agent to constitute such operations those of the principal. Plaintiff admittedly performed no transportation in its own vehicles. Therefore, grandfather rights were denied to plaintiff for failure to prove that it was actually conducting the prescribed operations on or prior to August 28, 1958.

We have carefully reviewed the whole record and find that there is substantial evidence to support the negative finding of the Commission that plaintiff (who had the burden of proof) failed to prove that it so controlled Alaska Van & Storage Company as to make its operations that of plaintiff. Such finding is therefore conclusive. 5 U.S.C. 1009; Chicago & E.I.R. Co. *v.* U.S. (D. C. Ind., 1952) 107 F. Supp. 118 aff'd. 344 U.S. 917, 73 S.Ct. 346, 97 L.ed. 707.

Plaintiff urges various legal propositions involving construction of 49 U.S.C. § 306(a)(4) and (5) and associated statutes which were novel when plaintiff's complaint was first filed. However, proceedings in this cause were stayed for a time, for reasons immaterial here and meanwhile similar actions by others aggrieved by the Commission's order in the Mollerup case, filed in other district courts of appropriate jurisdiction, were moving at a faster pace. Some of plaintiff's propositions are no longer novel, but have been decided adversely to plaintiff in Andrews Van Lines, Inc. *v.* United States (D. Nebr., 1965), aff'd. per curiam 382 U.S. 67, 86 S.Ct. ——, 15 L.ed. 2nd 144.

Specifically, Andrews holds, contrary to plaintiff's contentions, that shipments made to and from Alaska by water

transport are not to be considered as a motor carrier operation, and hence would not tend to qualify a motor carrier originating such shipments under the "grandfather clause."[1] The Andrews case also denies the contention made there, and by plaintiff here, that the Commission applied a more stringent standard of proof in applying such sections of statute than was intended by Congress. We must necessarily follow the holding of such case on these points, and do so without further elaboration.

Plaintiff's remaining argument is that, pursuant to 49 U.S.C. § 306(a)(2), above quoted, and pursuant also to its 1954 certificate of convenience and necessity which granted it authority to operate in all of the states of the United States, it already has permanent authority to operate in Alaska and that the Commission therefore has no power to deny it such right. In other words, it contends that since Alaska has been a state since January 3, 1959, the existing 1954 certificate should apply to it without more.

However, this matter was the subject of a separate Commission proceeding, Interpretation of Operating Rights-Alaska, 81 M.C.C. 701 (1959). In such proceeding, the Commission interpreted the terms "states" and "United States" appearing in certificates issued prior to January 3, 1959 (including plaintiff's) as not including the State of Alaska. This order has never been challenged in court. Plaintiff, in its brief, admits these facts, but now argues that the Commission's interpretation was erroneous. We do not believe that such order may thus be attacked collaterally in this proceeding. Plaintiff did not present such argument

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[1] It is undisputed on the record in this case that all of plaintiff's alleged transportations of household goods to and from Alaska moved by water between Seattle, Washington and Alaska ports, with the exception of approximately sixty shipments. Those latter shipments moved wholly overland by motor vehicle, via the Alcan Highway, but we find that the record clearly supports the Commission's finding that such shipments were not transported by plaintiff or its agent, but rather were handed over to another company for carriage, usually in less than truckload lots.

to the Commission in its petition for reconsideration, which precludes it from making it here. U.S. v. L. A. Tucker Truck Lines, 344 U.S. 33, 73 S.Ct. 67, 97 L.ed. 54.

Further and finally, it is apparent that Congress does not share plaintiff's view, or it would not have found it necessary to enact § 306(a)(4) and (5). These subsections apply specifically to Alaska and make it quite clear that continued operations to, from, and within such state depend upon the existence of actual operations on August 28, 1958. Plaintiff, of course, recognized this when it filed its application and presented evidence before the Commission. Having lost its case on the merits, it should not now be permitted to contend here for the first time that the entire proceeding in which it participated is a nullity.

The foregoing shall constitute findings of fact and conclusions of law under Rule 52(c) of the Federal Rules of Civil Procedure.

A judgment denying the relief sought and dismissing the action will be entered forthwith.

Dated this 15 day of June, 1966.

JOHN S. HASTINGS, Chief Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court

CALE J. HOLDER, Judge, U. S. District Court for the Southern District of Indiana, Designated Member of the Three-Judge Trial Court

S. HUGH DILLIN, Judge, U. S. District Court for the Southern District of Indiana, Assigned Trial Judge, and Member of the Three-Judge Trial Court

JUDGMENT

The Court having this day filed written opinion herein, setting out its findings of fact and conclusions of law, which opinion is in the words and figures, to-wit: (H.I.)

Now in accordance therewith, IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by its complaint herein, and that this cause of action be, and the same is now dismissed, with prejudice.

IT IS FURTHER CONSIDERED AND AJUDGED that plaintiff pay the costs of this action.

DATED this 15 day of June, 1966.

JOHN S. HASTINGS, Chief Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court

CALE J. HOLDER, Judge, U. S. District Court for the Southern District of Indiana, Designated Member of the Three-Judge Trial Court

S. HUGH DILLIN, Judge, U. S. District Court for the Southern District of Indiana, Assigned Trial Judge, and Member of the Three-Judge Trial Court

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1136

AERO MAYFLOWER TRANSIT CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J.S. App. 17a) of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. The Commission's order denied appellant's application for a certificate of public convenience and necessity to op-

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erate as a common carrier by motor vehicle between points in Alaska under the Alaska "grandfather" statute. 49 U.S.C. 306(a)(5). Section 306(a)(5) authorizes the Commission to issue such certificate, without proof that the public convenience and necessity will be served thereby, to any person who "was in operation on August 26, 1958, * * * as a common carrier engaged in the transportation in interstate or foreign commerce of passengers or property by motor vehicle between places in the territory of Alaska, and has so operated in Alaska since that time * * *."[1]

Appellant was one of a number of household goods carriers which sought such "grandfather" rights. The Commission consolidated the applications for hearing and decision and assigned two examiners to preside. Appellant claimed that it qualified for grandfather rights on the basis of operations between points in Alaska by Alaska Van & Storage Company ("Alaska Van") which, appellant alleged, had operated as its agent. In an earlier proceeding before the Commission, Alaska Van had previously obtained its own grandfather certificate on the basis of the same operations considered in this case.[2]

Appellant offered the testimony of two witnesses, its general business manager and the Seattle representative of Alaska Van, in support of its application. Neither witness testified as to shipments be-

[1] Appellant has abandoned a claim to "grandfather" rights between points in the contiguous forty-eight states and Alaska under 49 U.S.C. 306(a)(4) (J.S. 6).

[2] *Alaska Van & Storage Co., Inc.—"Grandfather" Applic.*, 94 M.C.C. 381, reversed on other grounds, 240 F. Supp. 501 (D. Alaska).

tween points in Alaska and none of its exhibits reflecting shipments between 1958 and 1962 dealt with such transportation. Indeed, appellant's general manager testified that its vehicles in Alaska were leased from Alaska Van, which hired, paid and directed the drivers, insured the vehicles, apparently registered them and had control of their operations (Tr. 697–698, 730). Alaska Van's Seattle representative could not describe Alaska Van's operations in Alaska and could not state with certainty whether appellant's Alaskan shipments had been handled by Alaska Van or one of its affiliates. Although the Seattle representative testified that appellant had the power to reject employees or facilities of Alaska Van (Tr. 771), appellant's general manager did not know whether that power had ever been exercised (Tr. 754).[3]

The examiners concluded that the appellant had failed to establish that it ever was engaged in operation as a common carrier by motor vehicle between points in Alaska and that its application, accordingly, should be denied (J.S. App. 10a). The Commission adopted the report and order of the examiners. *Mollerup Van Lines—Alaska Grandfather Applic.*, 95 M.C.C. 338.

A three-judge district court sustained the Commission's order (J.S. App. 12a–17a). Upon a careful review of the record, the court found that there was

[3] The Seattle representative also testified that appellant had carried household goods between the contiguous forty-eight states and Alaska—an issue not involved in this proceeding (see n. 1, *supra*)—and that it had received c.o.d. revenues and paid loss and damage claims (Tr. 776, 778).

substantial evidence to support the Commission's determination that the appellant, who had the burden of proof, had failed to show that it so controlled Alaska Van & Storage Company as to make its operations those of the appellant (J.S. 14a).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by this Court.

Appellant failed to show that it performed transportation services between points in Alaska during the relevant period. Its alleged agent there, Alaska Van, was awarded a grandfather certificate on the basis of the very operations now relied on by appellant.[4] The Commission found that Alaska Van had held itself out to perform those services, had maintained the staff, facilities and equipment necessary to do so, and had generally directed and controlled the operations involved. Although appellant had notice of Alaska Van's application (26 Fed. Reg. 2016), it declined to challenge that application. Having failed to do so, it cannot now collaterally attack the Commission's earlier determination by contending that Alaska Van was simply operating as its agent. Under these circumstances, the Commission's denial of appellant's application is plainly correct since "Congress did not intend to confer multiple 'grandfather' rights on the basis of a single transportation service."

[4] *Alaska Van & Storage Co., Inc.—"Grandfather" Applic.*, *supra*, n. 2.

United States v. *Rosenblum Truck Lines,* 315 U.S. 50, 56.

Appellant's contention (J.S. 12–16) that the Commission's order conflicts with *Thomson* v. *United States,* 321 U.S. 19, is without merit. First, *Thomson* reaffirmed the *Rosenblum* principle that a single transportation service cannot give rise to multiple grandfather rights (321 U.S. at 24, 25). Second, while *Thomson* indicated that the critical question is whether the applicant held itself out to the public as offering the services for which it seeks certification, here appellant offered no evidence to establish that it had ever held itself out to perform or that it could or did perform significant transportation services between points in Alaska; rather, all of its evidence was directed to the now abandoned claim under Section 306(a)(4) involving transportation "between places in the United States and places in Alaska." Third, in *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (D. Neb.), affirmed *per curiam,* 382 U.S. 67, the present order was sustained against attack by other carriers; the district court there concluded that the purported agency arrangement did not suffice under *Thomson* to make the Alaskan operations those of the applicants (240 F. Supp. at 769).[5]

Furthermore, appellant's evidence failed to show that it had exercised direction and control of the motor vehicle operations in Alaska for which it sought "grandfather" authority or that it had assumed full

[5] The Commission's conclusions in these consolidated proceedings were also sustained in *United Van Lines, Inc.* v. *United States,* 249 F. Supp. 984 (E.D. Mo.).

responsibility for such operations to shippers and to the general public. *Thomson* v. *United States*, 321 U.S. at 26; see also, *Moore* v. *United States*, 41 F. Supp. 786, 792 (D. Minn.), affirmed *per curiam* 316 U.S. 642. While domination, control, and direction may not be the sole test for determining whether the lessor or the lessee of the equipment is in fact the carrier who assumes ultimate responsibility for the transportation,[6] in the absence of a persuasive showing that appellant held itself out as an Alaskan carrier or assumed the risks of Alaskan operations, neither the Commission nor the lower court erred in rejecting appellant's claims.[7]

Finally, appellant's contention (J.S. 17–20) that the Commission's findings are not supported by substantial evidence was, upon review of the whole record, rejected by the court below (J.S. App. 14a). Appellant bore the burden of proving that it had been in operation in Alaska, and it failed to sustain that burden. In any event, this contention plainly does not present a substantial question for this Court's consideration. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503.

[6] *United States* v. *Drum*, 368 U.S. 370.

[7] *Motor Truck Supply Co.* v. *United States*, 238 F. Supp. 645, 647 (D. Minn.); *Schultz Transit, Inc.* v. *United States*, 208 F. Supp. 537, 541 (D. Minn.); *Allen* v. *United States*, 187 F. Supp. 625, 629 (S.D. Fla.); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13, 20 (D. Minn.),

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1136

AERO MAYFLOWER TRANSIT CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From The United States District Court
For The Southern District of Indiana

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, appellees, Alaska Orient Van Service, North American Van Lines, Inc. and Smyth Overseas Van Lines, Inc., move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. The Commission's order denied appellant's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle between points in Alaska under the Alaska "grandfather" statute. 74 Stat. 382; 49 U.S.C. §306(a)(4) and §306(a)(5). This application was heard by an examiner of the Commission, reviewed by Division 1 of the Interstate Commerce Commission (which affirmed the Examiner's Recommended Report and Order); the Commission's decision was reaffirmed unanimously by the members of the three-judge court for the Southern District of Indiana; appellant's motion for rehearing before the three-judge court was denied and the subject appeal is the latest effort of appellant in this drawn out litigation.

ARGUMENT

The decision below should be affirmed without plenary review by this Court for the following reasons:

1. This is not a matter of first impression. This Court affirmed the Interstate Commerce Commission's denial of an identical application in *Andrews Van Lines, Inc. v. United States* (D. Nebr. 1965), aff'd. mem., 382 U.S. 67 (1965). A three-judge court for the Eastern District of Missouri similarly affirmed the Commission's denial of an identical application in *United States Van Lines, Inc. v. United States*, 249 F.Supp. 984 (E.D. Mo. 1965). Appellant

has not shown that these decisions on applications for Alaska operating rights, identical with its own, are inapplicable to it and this fact alone constitutes a basis for affirmance.

2. Since appellant recognizes that only one carrier may be given operating authority on the basis of a single set of operations, citing *United States v. Rosenblum Truck Lines, Inc.*, 315 U.S. 50 (Appellant's Brief, p. 12), the essence of this appeal is that the Commission erred in granting operating authority to Alaska Van & Storage, Inc., the carrier located in Alaska which performed the actual motor transportation of the shipments involved, and that this authority should have instead been granted to appellant, Aero Mayflower Transit, Inc. At the threshold, we submit that appellant cannot use this suit as a means of collaterally attacking a decision of the Commission in *Alaska Van & Storage Co., Inc. - "Grandfather" Application*, 94 M.C.C. 381 (1964). *Callanan Road Co. v. United States*, 345 U.S. 507, 512-13; *Yakus v. United States*, 321 U.S. 414, 429-430.

3. Going beyond this point, appellant bases its appeal upon the claim that the Commission's findings are not supported by substantial evidence, and more specifically, the finding that: "All matters pertaining to the operation of the vehicles, and the direction and control of such operation were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier." (Appellant's Brief, p. 19).

The evidence before the Commission, however, clearly supports the Commission's finding.

Appellant's own witnesses testified that Alaska Van and Storage Company, not appellant, hired and fired drivers in Alaska, paid their salaries, and gave

them directions (Tr. 697, 701); that the trucks in Alaska were registered in the name of Alaska Van and Storage, not Aero Mayflower, and Alaska Van and Storage paid the public liability insurance (Tr. 697-698); that Alaska Van and Storage, not appellant, determined the schedule of loading and unloading, and controlled the entire physical operation in Alaska (Tr. 698-700); and that Aero Mayflower did not concern itself with the Alaska operations, but merely paid a straight fee for the services performed by Alaska Van and Storage Company for it in Alaska. (Tr. 701).

Moreover, the record shows that appellant owns no equipment in Alaska and maintained no supervisory personnel or employees of its own in Alaska (Tr. 725, 729), admitted that inspection and control over motor vehicles in Alaska was exercised by Alaska Van and Storage Company, which owned them (Tr. 730-732, 752), and knew of no employees or facilities of Alaska Van and Storage Company that were ever submitted for approval by appellant since 1957. (Tr. 754-755).

The record is devoid of any evidence that the drivers of the trucks supposedly leased to appellant ever submitted logs, safety reports or medical examination reports to Aero Mayflower, that appellant had any motor vehicle equipment reserved for its exclusive use under the alleged lease on and after August 26, 1958 [the critical date], or that Aero Mayflower ever held a license to do business in the State of Alaska. Accordingly, viewing the evidence before it under the applicable law, the Commission quite properly concluded that the alleged lease was not effective as a *bona fide* lease arrangement since appellant did not *in fact* exercise direction and control of motor vehicle operations performed in Alaska by its purported agent so as to make the Alaska operation its own, and was not therefore a common carrier by

motor vehicle between points in Alaska on and after August 26, 1958, entitled to a grandfather certificate.

The Commission's holding is therefore fully supported by substantial evidence of record.

4. Apparently recognizing the difficulty in supporting its claim that the Commission's decision is unsupported by substantial evidence, appellant attempts to prop up its appeal with an argument that the Commission employed an erroneous legal standard, more specifically, that the "physical control test" is not determinative of which carrier is entitled to the motor carrier operating certificate. In its briefs and oral hearing before the three-judge court, appellant argued that the motor carrier operations in Alaska physically performed by Alaska Van & Storage were in fact under the direction and control of appellant, Aero Mayflower. At no point, did appellant argue before the Commission or in the court below, *as it does here for the first time*, that the Commission acted erroneously in applying the physical control standard. This argument is therefore entitled to no consideration by this Court. *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *United States v. Capital Transit Co.*, 338 U.S. 286, 291 (1949). Furthermore, appellant recognizes that in order to come within the purview of *Thompson v. United States*, 321 U.S. 19 (1944), which appellant relies upon in making this new argument, Aero Mayflower would have had to perform a single coordinated transportation service, including the portion in Alaska. (Appellant's Brief, p. 16). As we have shown, *supra*, the schedule of dispatch, loading and unloading and direction of the transportation in Alaska was solely in the control of Alaska Van and Storage — and this is what the Commission properly found.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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ARGUMENT

I

The Decision Below Rests Upon An Erroneous Legal Standard

Appellees admit that under this Court's holding in *Thomson* v. *United States,* 321 U.S. 19, the critical question in determining whether lessor or lessee of a motor vehicle has performed the single coordinated

transportation service is which of the two held itself out to the public as offering the service. (M.A. 5).[1] They assert, however, that all of appellant's evidence was directed to its claim under Section 306(a)(4) for authority to transport goods between places in the contiguous forty-eight states and places in Alaska, and that it "offered no evidence to establish that it had ever held itself out to perform . . . significant transportation services between points in Alaska." (*Ibid.*) That contention demonstrates a misunderstanding of the fact that appellant's transportation service between points within Alaska was but a part of its overall, through service from origin to destination (T. 54-55); therefore, all evidence regarding appellant's overall operations was also evidence of its operations within Alaska, and was so considered by the examiners (J.S. 7a-8a).

Both appellees and intervenors cite *Andrews Van Lines* v. *United States*, 240 F. Supp. 763 (D. Neb. 1965), *aff'd per curiam*, 382 U.S. 67, and *United States Van Lines* v. *United States*, 249 F. Supp. 984 (E.D. Mo. 1965), to support their contentions that appellant's agency arrangement with Alaska Van & Storage did not suffice to make Alaska Van's operations those of appellant. (M.A. 5; I.M.A. 2-3). But neither of those cases involved appellant at all, and the very reason this appeal is necessary is that the Commission decided appellant's rights on the evidence pertaining to other carriers. The facts of the *Andrews* and *United*

[1] References to "M.A." herein are to the Motion to Affirm filed by the United States and the Interstate Commerce Commission (herein called appellees); the Motion to Affirm by North American Van Lines, Alaska Orient Van Service, and Smyth Overseas Van Lines, Inc. (herein called intervenors) is designated "I.M.A."

States Van cases are separate and distinct and differ from the facts of record in support of appellant's application.[2]

Appellees assert that there is no evidence to show that appellant "assumed full responsibility" for its operations within Alaska or that appellant "assumed the risks" of its Alaska operations. (M.A. 5-6). On the contrary, the record clearly shows that appellant assumed complete responsibility for all its shipments to and from Alaska, including the payment of all claims and expenses of the transportation. (T. 776, 740).

Finally, both appellees and intervenors argue that Alaska Van & Storage has already been granted a certificate on the basis of the "very operations" relied on by appellant, and that under the doctrine of *United States* v. *Rosenblum Truck Lines,* 315 U.S. 50, 56, a second certificate for the same operation is impermissible. (M.A. 2, 4-5; I.M.A. 3). The short answer is that there is not substantial evidence in the record to support a finding that the transportation services upon which appellant predicates its application for grandfather authority are the same transportation services for which Alaska Van & Storage was granted such a certificate. In fact, there is no direct evidence whatsoever in the record that the two applications overlapped (see T. 719), and it would be totally erroneous

[2] Although the Mollerup proceeding resulted in a single opinion containing generalized findings purporting to apply to all applicants for Section 306(a)(5) authority (J.S. 1a), each of the nineteen applicants, including appellant, made a separate presentation of evidence in support of its application, and the evidence of one applicant had no relevance to any other. Thus, each appeal from the single order must necessarily be predicated on the peculiar facts regarding that appellant's application.

to infer such a conclusion, since Alaska Van is a common carrier in its own right and performs many transportation operations of its own, including interline services for U. S. Van Lines and other common carriers. For all that appears in the record, its application for grandfather authority may well have been based solely on those operations,[3] and *Thomson* suggests that it is quite permissible to grant an agent grandfather authority on the basis of operations other than those performed for the primary carrier (321 U.S. at 25-26).

An additional complete answer is that such a contention evidences an obvious misunderstanding of the *Rosenblum* holding. In that case neither of the carriers participating in the transportation service had previously been awarded a grandfather certificate for such service. Therefore the Court's preliminary holding that a single set of operations justifies only one grandfather certificate did not automatically eliminate one of the carriers from consideration, but only narrowed the essential question to which of the two carriers should receive the one certificate.

The case at bar presents a significantly different question. Since Alaska Van has already been granted a certificate, the question in this case is not which of the two carriers should receive a grandfather certificate for their allegedly mutual operations, but whether appellant is precluded from receiving such a certificate by the mere fact that Alaska Van has been previously certificated for such operations. The contention of

[3] Such a conclusion is bolstered by the fact that an agent of Alaska Van appeared in support of appellant's application (T. 767) and testified that all the shipments relied upon by appellant were in fact Mayflower shipments (T. 767, 772).

appellees and intervenors, if accepted, would deny appellant a hearing on the merits of its application by making its right to a certificate contingent on the outcome of a prior proceeding in which it was not heard. *Alaska Van & Storage, Alaska Grandfather Application,* 94 M.C.C. 381 (1964).[4]

Rosenblum did not so hold. On the contrary, once it is established that an applicant qualifies for a Section 306(a)(5) certificate, the certificate must be issued forthwith, and the fact that another carrier has previously qualified, on the basis of what are alleged to have been the same operations, is no ground for refusing to issue the second authorization. See *Alaska Van & Storage Co.* v. *United States,* 240 F. Supp. 501, 503 (D. Alaska 1965), in which a three-judge court held that the Commission, having found two applicants qualified for grandfather authority even though on the basis of what it asserted to be the same operations, could not refuse to grant two authorizations:

> "[T]he Commission having found that each of the applicants met the requirements of the Act and having found each of them to be entitled to a certificate authorizing such operations, was required by the mandatory wording of the statute

[4] Even though appellant did not participate in the prior proceeding in any way, appellees assert that Mayflower "had notice" of Alaska Van's application (M.A. 4). While that is technically true, appellant certainly had no reason to suspect that its agent was going to rely on appellant's operations in support of its own application, and hence had no reason to intervene in that proceeding. On the contrary, during the time that application was pending, Alaska Van was cooperating fully with appellant in this proceeding (T. 767), and for the agent to have asserted rights of its own on the basis of its services for appellant would have contravened at least the spirit if not the letter of the exclusive agency agreement between the two companies.

to issue a certificate to each applicant 'without further proceeding.'"

This appeal is not a collateral attack as appellees and intervenors contend (M.A. 4; I.M.A. 3), but an assertion of rights clearly granted by statute. Any error by the Commission in another case should not be permitted to prejudice the appellant's clear right herein.[5]

II

The Findings Upon Which the Examiners Disposed of the Applications Are Not as to This Appellant Supported by Substantial Evidence

Appellees totally ignore appellant's specific objections that several of the examiners' findings are not supported by substantial evidence. The generalized assertion that these contentions were considered and rejected by the court below (M.A. 6) is no answer at all; the question is whether that court's action was proper.

Intervenors cite a number of facts which allegedly support the examiners' ultimate finding that the Alaska-based carriers dominated and controlled all the Alaska operations in question. (I.M.A. 3-4). How-

[5] Intervenors also allege that appellant is precluded from raising its wrong-legal-theory contention here because it did not do so before the Commission. (I.M.A. 5). This is a mere play on words. Appellant's evidence before the examiners went to the question of a "single coordinated transportation service" as well as to that of "direction and control." Further, in all of its various motions before the Commission as well as in its complaint and briefs to the district court, appellant has contended that the examiners erred in refusing to grant it a Section 306(a)(5) certificate on the basis of its agent's operations in Alaska. United States v. Tucker Truck Lines, 344 U.S. 33, 36-37, relied on by intervenors, does not require a more explicit statement to preserve the point for appeal.

ever, very few of the facts enumerated by the intervenors were cited by the examiners as a basis for their conclusion,[6] and none of the specific findings challenged by appellant are even mentioned in the intervenors' brief. Intervenors have thus in effect, by their silence, admitted that many of the facts found by the examiners to constitute a basis for their conclusion are not, as to appellant, supported by substantial evidence; they have then asserted new facts, not found by the examiners, to buttress that conclusion. Such a stratagem ignores the fundamental rule that ultimate administrative findings must be supported by basic findings explicitly set forth in the opinion. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 533. When sufficient basic findings are not set forth, or when the basic findings that are set forth are found to be erroneous, the ultimate finding must be discarded. *Secretary of Agriculture* v. *United States,* 350 U.S. 162, 167. The record may not be searched for additional facts sufficient to form a basis for the conclusion. *Atchison, T. & S.F. Ry.* v. *United States,* 295 U.S. 193, 201-02.

Additionally it should be noted that the picture which intervenors paint of appellant's Alaska opera-

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[6] Among the "new" facts cited by the intervenors, but not found by the examiners, are the following: That the trucks used in Alaska were registered in the name of Alaska Van; that Alaska Van paid the public liability insurance; that the agent "determined the schedule of loading and unloading"; that appellant "did not concern itself with the Alaska operations" but only paid a "straight fee" for its agent's services; that the vehicles used were inspected by Alaska Van; that none of the agent's employees or facilities had been "submitted for approval" by appellant since 1957; that "no logs, safety reports, or medical examination reports" were submitted to appellant by the drivers; and that Mayflower had no license to do business in Alaska.

tions very closely parallels the description in the record of North American Van Lines' operations in the United States (T. 595-97, 748), and comports with the standard operating procedures of all national household goods movers. Acquisition of supplementary vehicles by means of equipment leases has been approved by the Interstate Commerce Commission (T. 597) and is regulated by that body as a means of assuring control of leased vehicles in the lessee, so as to bring such vehicles within the Commission's authority (see J.S. 19, n.3). Appellant's lease agreements with its agent Alaska Van & Storage were in strict conformance with these regulations. See 49 C.F.R. 207.4(4)(ii).

Finally, appellees assert that appellant's substantial evidence point does not present "a substantial question for this Court's determination." (M.A. 6). To the extent this statement is intended to suggest that the question is not one of general importance, it is sufficient to note that a case coming to this Court on appeal, as this one does, stands on a different footing from one presented on application for writ of certiorari. For an appeal the appellant need not show importance in any general sense; it is enough that he show a substantial possibility of error affecting his own interests. This appellant has done.

CONCLUSION

For the foregoing reasons, appellant respectfully suggests that the issues presented by this appeal are so substantial that they warrant plenary consideration by this Court.

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No. 1136. Decided May 15, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.